(2)

No. 01-1694

JUN 18 2002

CLERK

IN THE

Supreme Court of the United States

ROGER V.S. CAMP,

Petitioner,

v.

BRANCH BANKING & TRUST COMPANY OF VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Fourth Circuit correct in holding that Petitioner was obligated to repay to Respondent, under the clear and unambiguous terms of the guaranty, the debts, obligations and liabilities as evidenced in at least four separate and distinct ways?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Branch Banking & Trust Company of Virginia, is a wholly owned subsidiary of Branch Banking & Trust Corporation, a publicly held corporation.

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REASONS FOR DENYING THE WRIT

The Petitioner mischaracterizes the findings of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). The sole question presented by the Petitioner is whether a guarantor is liable under the terms of an irrevocable letter of credit that is amended without the consent of the applicant. (Petition for Certiorari ("Pet.") at i.) The Fourth Circuit, however, held that the guaranty obligated the Petitioner to repay the debts, obligations and liabilities of Midwest Markets which he guaranteed, without finding a need to address the letter of credit. (Pet. at 8.) According to Petitioner, "[i]f the Fourth Circuit's opinion is allowed to stand, then the long standing rule that the terms of a Letter of Credit may not be amended without the consent of the applicant will be materially altered." (Pet. at 7-8.) The material alteration of the "UCC, UCP, and the laws of all 50 states and the District of Columbia" (Pet. at 6) posited by the Petitioner does not follow from the Fourth Circuit's opinion.

The Fourth Circuit's ruling does not raise the question presented by the Petitioner. It is not in conflict with any other Circuit and thus has no far-reaching implications beyond the two parties in this matter. Furthermore, the Fourth Circuit's ruling was proper in all respects and Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I.

THE QUESTION PRESENTED BY THE PETITIONER MISREPRESENTS THE DECISION BELOW

Simply stated, the Petitioner misstates the Fourth Circuit's decision, which did not consider his question presented. The Petitioner blatantly misrepresents the Fourth Circuit's holding in an attempt to persuade this Court to address the matter. The case below involved one basic question: does the guaranty obligate the Petitioner to pay *all* debts, obligations and liabilities of Midwest Markets to the Respondent up to a total amount of $200,000, or is the guaranty limited to debts incurred under the letter of credit? The guaranty states in pertinent part:

> As an inducement to [BB&T] to extend credit to and otherwise deal with [Midwest Markets], and in consideration thereof, the undersigned . . . hereby *absolutely and unconditionally guarantees* to Bank and its successors and assigns the due and punctual payment of any and all notes, drafts, debts, obligations, and liabilities, primary or secondary (whether by way of endorsement of otherwise), of Borrower, at any time, now or hereafter, incurred with or held by Bank, together with interest, as and when the same shall become due and payable, . . . , in accordance with the terms of such notes, drafts, debts, obligations, or liabilities or agreements evidencing any such indebtedness, obligation or liability including all renewals, extensions and modifications thereof.

(Pet., App. at 6) (emphasis added.)

The guaranty provided the Petitioner with three options to limit the terms of the guaranty by making an "X" next to the option selected. The guaranty provided: (1) a choice of unlimited liability; (2) an option limited by the terms of a specific promissory note; or (3) an option limited by a dollar amount. The Petitioner ultimately chose to limit the guaranty by the third option, and placed a cap on his liability of $200,000. (Pet., App. at 6.)

Virginia law is well settled that when the meaning of the language employed in a document is clear, "the instrument must be given effect accordingly." *Virginia Ry Co. v. Avis*, 124 Va. 711, 716, 98 S.E. 638, 639 (1919). This is precisely what the Fourth Circuit did. It correctly held that the "guaranty . . . clearly states that Camp [personally] guarantees to BB&T all debts of Midwest Markets held by BB&T." (Pet., App. at 9.)

Respondent argued before both the trial court and the Fourth Circuit that the Petitioner was liable under the guaranty as evidenced in four distinct ways: (1) a bankruptcy "Order Allowing Claim" agreed to by Midwest's bankruptcy representative; (2) invoices assigned to Respondent from Roundy's; (3) the letter of credit; and (4) the subrogation of Roundy's rights against Midwest Markets. (Pet., App. at 9.)

The Petitioner's own bankruptcy counsel endorsed the "Order Allowing Claim" admitting to the debt just four days before commencement of the trial. (Pet., App. at 7.) As a result of honoring Roundy's demands for payment, the Respondent took an assignment of Roundy's unpaid invoices to Midwest Markets. Additional evidence of the debt arises from the subrogation of Respondent to Roundy's rights against Midwest Markets by virtue of Respondent's payments to Roundy's. (Pet., App. at 9.)

The Fourth Circuit chose to focus on Roundy's assignment of Midwest Markets' unpaid invoices to Respondent as evidence of this debt. (Pet., App. at 9.) It found that "testimony and evidence at trial unequivocally revealed that Roundy's assigned Midwest Markets' unpaid invoices to" the Respondent. (Pet., App. at 9.) The Petitioner never disputed the validity of the assignment at trial or before the Fourth Circuit (Pet., App. at 9); and cannot now claim that the assignment exists only as a result of mistake by the Respondent. (Pet. 9.)

The Fourth Circuit stated in no uncertain terms that "[b]ecause Midwest Markets was indebted to BB&T by virtue of the assignment of the invoices, *we need not consider the other three.*" (Pet., App. at 9) (emphasis added). The letter of credit issue is but one of the four ways way in which the debt is evidenced; a finding that the letter of credit was not properly extended will not change the outcome of this case.

In its question presented, the Petitioner focuses on the proper means by which a letter of credit may be extended under § 5-106(b) of the U.C.C. (Pet. at i.) The Petitioner states that the U.C.C. mandates that "after a letter of credit is issued, rights and obligations of a beneficiary, applicant, confirmer, and issuer are not affected by an amendment or cancellation to which that person has not consented." U.C.C. § 5-106(b) (1995). The Respondent does not contest that statement, but it is irrelevant in determining the outcome of this case. Even assuming *arguendo* that the letter of credit executed by Midwest Markets was not properly extended, the Fourth Circuit would have ruled exactly the same way. By the plain language of the guaranty, the Petitioner remained *personally obligated* to the Respondent via the Respondent's rights acquired under the assignment. The Petitioner's choice

to highlight § 5-106 of the U.C.C. when the Fourth Circuit found it irrelevant is nothing more than an attempt by the Petitioner to exaggerate the significance of that court's holding in order to cause this Court to revisit an issue which in reality is nothing more than a straightforward interpretation of a guaranty contract. The Fourth Circuit's holding was proper in all respects and does not call for review by this Court.

II.

THE FOURTH CIRCUIT'S RULING DOES NOT CONFLICT WITH THE EXISTING U.C.C. OR U.C.P., NOR DOES IT PRESENT A CONFLICT AMONG THE CIRCUITS

The Petitioner's contention that the Fourth Circuit's ruling is at odds with other Circuits is without merit. The basis of the Petitioner's claim is grounded in an interpretation of U.C.C. § 5-106(b). Its question presented is unimportant because there is no dispute that Uniform Commercial Code ("U.C.C") § 5-106(b) states what Petitioner says it does. Petitioner's argument is unfounded because although the Petitioner is of the opinion that § 5-106(b) is "of substantive legal significance" (Pet. at 6) to the outcome of this case, the Fourth Circuit did not address the issue in reaching its decision. It is axiomatic that the Fourth Circuit's holding in this case cannot be in conflict with existing law when its decision did not turn on U.C.C. § 5-106. Not only does the Petitioner neglect to cite case or statutory law that contradicts the Fourth Circuit, the Petitioner fails to cite any case law at *all in* support of its position. The argument is merely a feeble attempt to create a legal issue worthy of further consideration. The purported conflict stated by the Petitioner simply does not exist, and additional review by this Court is unnecessary.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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